D.O. Productions, LLC *and* Bakery, Confectionery, Tobacco Workers and Grain Millers' International Union Local 53. Case 22–RM–270677

June 17, 2021

DECISION ON REVIEW AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

The Employer-Petitioner's Request for Review of the Acting Regional Director's administrative dismissal of its RM petition is granted as it raises substantial issues warranting review.[1] On review, we affirm the Acting Regional Director's dismissal of the petition, but only for the reasons stated herein.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

I. BACKGROUND

The Employer-Petitioner produces and distributes frozen food products. Since about 1990, Bakery, Confectionary, Tobacco Workers and Grain Millers' International Union Local 53 (the Union) has represented a unit of employees at the Employer-Petitioner's Lodi, New Jersey facility. The parties' most recent collective-bargaining agreement expired on March 31, 2020.

On October 12, 2020, the Employer-Petitioner withdrew recognition from the Union based upon an employee disaffection petition ostensibly signed by 43 of 79-unit employees. On October 27, 2020, the Union filed unfair labor practice charges alleging that the withdrawal of recognition was unlawful.

On December 23, 2020, the Employer-Petitioner filed the instant RM petition based upon the same employee disaffection petition that it used to withdraw recognition from the Union in October.

On December 30, 2020, the General Counsel issued a complaint in Case 22–CA–268184 alleging, in part, that the Employer-Petitioner unlawfully withdrew recognition from the Union.[2] On February 1, 2021, the Acting Regional Director approved the parties' informal Board Settlement Agreement. The settlement contains the following admissions clause:

> By entering into this Agreement, the Charged Party admits to violating Section 8(a)(5) of the Act when it withdrew recognition from the Union on about October 12, 2020. This violation of the Act is based on the following evidence: 1) employees forged other employees' signatures on the showing of interest petition, meaning that some of the employees whose names appeared on the petition did not in fact want to remove the Union as their collective bargaining representative; 2) employees misrepresented to other employees the true purpose of the petition; and 3) the Charged Party did not compare the signatures on the showing of interest petition with writing exemplars of employees' signatures that were contained in the Charged Party's personnel files. Based on these reasons, the Charged Party did not have objective evidence of an actual loss of majority support when the Charged Party withdrew recognition from the Union on about October 12, 2020. As of December 30, 2020, the date that the consolidated complaint issued in this case, Region 22 was not presented with evidence of supervisory taint in the collection of the showing of interest nor was Region 22 presented with evidence of taint of the showing of interest petition as a result of the Charged Party's March 2020 direct dealing, the details of which are outlined in paragraph 9 of the consolidated complaint.

On February 3, 2021, citing *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Acting Regional Director administratively dismissed the RM petition on the grounds that the Employer-Petitioner failed to provide "current, timely, and/or authentic evidence of objective considerations establishing that [the Union] no longer enjoys the support of a majority of the employees in the bargaining unit." He noted in this regard that the only evidence proffered by the Employer-Petitioner was the same disaffection petition at issue in the unfair labor practice case. Although not mentioned in the dismissal letter, the Region's administrative investigation of the validity of the signatures disclosed that at least eight signatures were invalid.[3] Specifically, the Region determined that one employee signed twice and his or her signatures did not

[1] The Acting Regional Director's dismissal letter inadvertently stated that the parties had the right to request review pursuant to Sec. 102.67 of the Board's Rules and Regulations, and thus the Employer-Petitioner cited both that section and Sec. 102.71 in seeking review. Requests for review of administrative dismissals are governed by Sec. 102.71, however, and we consider the Employer-Petitioner's request for review as having been filed pursuant to that section.

[2] We take administrative notice of the record in Case 22–CA–268184, on which the facts stated herein are based.

[3] Due to the unusual circumstances surrounding the petition, specifically the related unfair labor practice case settlement with an admissions clause acknowledging that some signatures on the disaffection petition were forged and the purpose of the petition was misrepresented to some signatories, we agree that it was proper for the Region to conduct an administrative investigation into the validity of the disaffection petition. See Sec. 9(c)(1)(B); see also NLRB Casehandling Manual (Part II), Representation Proceedings (CHM) Sec. 11042.3 (stating that Regional Director will investigate sufficiency of employer's evidence if warranted by unusual circumstances).

match, four other employees said that they did not sign and the Region determined that their names were incorrectly spelled, a sixth employee's name was also incorrectly spelled, a seventh employee advised the Region that he or she did not sign the petition, and an eighth employee advised the Region that he or she signed a different paper.[4]

As alternative grounds for the dismissal, the Acting Regional Director described the RM petition as premature relative to the meritorious allegations that were subject to the settlement agreement in the unfair labor practice case. He found, citing *Truserv Corp.*, 349 NLRB 227 (2007), that in order to ensure that evidence of a loss of majority support is obtained in an atmosphere that is free of coercion, a showing of interest supporting an RM petition must be obtained after the expiration of a notice-posting period remedying any recent unfair labor practices because employee sentiments predating achievement of the full remedy of a settled unfair labor practice case could not support an RM petition.

In its request for review, the Employer-Petitioner asserts that the Acting Regional Director erred in dismissing its RM petition and that the dismissal was arbitrary and capricious because the letter did not explain why the disaffection petition failed to meet the *Levitz* standard for demonstrating good-faith reasonable uncertainty of the Union's continued majority status. It also argues that the Acting Regional Director erred in finding the disaffection petition to be untimely and further erred by relying on the insufficiency of the disaffection petition to demonstrate an actual loss of majority support in the settled unfair labor case. Lastly, the Employer-Petitioner argues that the Acting Regional Director's administrative dismissal is inconsistent with Section 103.20 of the Board's Rules and Regulations, the "Election Protection Rule."

II. ANALYSIS

In *Levitz*, the Board held that an employer may unilaterally withdraw recognition from an incumbent union, with its presumption of continued majority support, only if it has objective evidence that the union has, in fact, lost majority support. 333 NLRB at 717. At the same time, the Board adopted a lower standard for processing RM petitions, finding that, in order to process an RM petition under Section 9(c)(1)(B) of the Act, an employer must demonstrate only that it has good-faith reasonable uncertainty, based on objective considerations, of the union's continued majority support. 333 NLRB at 717, 727–728; see also CHM Section 11042.[5] Under this standard, the employer bears the burden to provide evidence in support of an RM petition "that is objective and that reliably indicates employee opposition to incumbent unions — i.e., evidence that is not merely speculative." *Levitz,* 333 NLRB at 729.

Consistent with this precedent, the Employer-Petitioner was required to demonstrate that it has good-faith reasonable uncertainty, based on objective considerations, that a majority of unit employees continue to support the Union. The only evidence the Employer-Petitioner submitted, however, was the disaffection petition. As noted above, the Employer-Petitioner admitted in Case 22–CA–268184 that this petition contained less than a majority of signatures due to forged and unverified signatures, among other things. Moreover, the Region, through its administrative investigation in this case, confirmed that at least eight signatures on that petition were invalid.[6] As a result, the petition, standing alone, only indicated that 44 percent of employees no longer supported the Union.[7]

We hold that a disaffection petition signed by a *minority* of unit employees, standing alone, is insufficient to establish a good faith, reasonable uncertainty regarding the union's continued *majority* status under *Levitz.* It has long been held that, during certain periods of time, unions are presumed to enjoy the support of a majority of unit employees. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990). Indeed, even newly-hired employees are presumed to support the union in the same proportion as the employees they replace. Id. at 779. This

[4] A petition will not be automatically dismissed where employees, without any party involvement, have engaged in fraud, forgeries, or misrepresentations in obtaining a showing of interest. Instead, the Board considers the remaining number of valid signatures. See, e.g., *Dayton Hudson Dept. Store Co.*, 314 NLRB 795, 804 (1994) (finding no basis for setting aside election where union did not know that a few of the authorization cards it submitted were forged because valid showing remained sufficient), enfd. 79 F.3d 546 (6th Cir. 1996), cert. denied 519 U.S. 819 (1996); see also CHM Sec. 11028.2 (stating that in the absence of a ULP charge, a petition may only be dismissed if there was direct party involvement in the tainted showing) and Sec. 11029.3 (stating that petition will be dismissed based on forgeries if remaining valid showing falls below the required amount).

[5] Accordingly, we disavow any implication in the dismissal letter that the Employer-Petitioner was required to establish *actual* loss of majority status in order to support the RM petition.

[6] Whether the objective considerations submitted by an employer in support of an RM petition establish good-faith reasonable uncertainty is an administrative determination made by Regional Directors and may not be litigated. See *Hydro Conduit Corp.*, 278 NLRB 1124, 1124 (1986), enf. denied on other grounds 813 F.2d 1002 (1987); CHM Sec. 11042. Nevertheless, we note that it would have been preferable for the Acting Regional Director's dismissal letter to more specifically explain both the results of the administrative investigation of the petition and his basis for determining that the remaining signatures were insufficient under the applicable good faith, reasonable uncertainty standard.

[7] As noted above, the petition listed 43 names, out of a unit of 79 employees. With at least eight signatures having been determined to be invalid, the remaining 35 signatures fell short of a majority.

presumption of continuing majority support may be rebutted when, for instance, the parties' collective-bargaining agreement expires.[8] See *Auciello Iron Works*, 317 NLRB 364, 367 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), affd. 517 U.S. 781 (1996). To rebut this presumption, however, a party must proffer evidence that establishes a reasonable uncertainty regarding the *majority's* support for the union.[9]

As discussed above, the Employer-Petitioner failed to meet this standard. Had the Employer-Petitioner presented evidence of, for example, firsthand statements by employees concerning personal opposition to an incumbent union, or employees' unverified statements regarding other employees' antiunion sentiments, or employees' statements expressing dissatisfaction with the union's performance as bargaining representative, it might well have been able to establish good-faith reasonable uncertainly about the continued support of a *majority* of unit employees. See *Levitz,* 333 NLRB at 728–729; see also *Allentown Mack Sales & Service v. NLRB,* 522 U.S. at 369 (good faith uncertainty established by evidence that 20 percent of the 32-person bargaining unit had expressly disavowed the union *plus* an eighth employee's statement that he was dissatisfied with his representation and statements by two other employees indicating broad lack of support for the union among the workforce in general).[10] Here, however, there was no evidence other than the petition. As explained, that evidence was insufficient.

We therefore affirm the dismissal of the RM petition.

In doing so, we do not rely on the Acting Regional Director's alternative grounds for dismissing the RM petition. Specifically, we find that dismissing the RM petition was not warranted on the basis that the disaffection petition was found to be tainted in the settled unfair labor practice case. The disaffection petition was not, in fact, found tainted in the unfair labor practice case. The admissions clause contained in the settlement explicitly states that there was no evidence of supervisory taint in the collection of the petition signatures or that an earlier unfair labor practice allegation tainted the petition.

Because we have affirmed the dismissal on other grounds, we find it unnecessary to pass on the Acting Regional Director's statements indicating that the RM petition should be dismissed under *Truserv* or his statements regarding the timing of a showing of interest in relation to the notice-posting period for the settlement of the unfair labor practice case. For the same reason, we find it unnecessary to pass on the Employer-Petitioner's argument that the petition could not be dismissed on the basis that it was tainted by unfair labor practices without a hearing, consistent with *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004).

Finally, we reject the Employer-Petitioner's argument that dismissal of this RM petition would be inconsistent with Section 103.20 of the Board's Rules and Regulations. Section 103.20 replaced the Board's policy of blocking elections based on pending unfair labor practice charges with a vote-and-count or a vote-and-impound procedure. But our affirmance of the Acting Regional Director's dismissal is not based on any pending or settled charge. Instead, as explained above, we affirm the dismissal on the grounds that the Employer-Petitioner failed to establish objective considerations demonstrating a good-faith reasonable uncertainty as to the Union's continuing majority status. Section 103.20 does not address, and did not affect in any way, this longstanding requirement for the processing of an RM petition.

To conclude, the objective considerations provided by the Employer-Petitioner were insufficient to satisfy its burden to demonstrate its good-faith reasonable uncertainty of the Union's continued majority status. Accordingly, we affirm the Acting Regional Director's dismissal of the RM petition.

ORDER

The Acting Regional Director's administrative dismissal of the petition is affirmed.

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[8] As recounted above, the Employer-Petitioner filed the RM petition after the expiration of the parties' collective-bargaining agreement.

[9] This standard is consistent with the Board's decisions that have consistently held that disaffection petitions signed by a minority of unit employees are insufficient, without more, to establish good-faith, reasonable uncertainty of the union's majority status. See *Marion Memorial Hospital*, 335 NLRB 1016, 1018 (2001) (finding signatures from 44 percent of unit employees insufficient), enfd. 321 F.3d 1178 (D.C. Cir. 2003); *Heritage Container, Inc.*, 334 NLRB 455, 455 (2001) (finding signatures from 35 percent of unit employees insufficient). As the Board stated in *Heritage Container,* "the bargaining unit consisted of 69 employees, but only 24 unit employees signed the petition, 11 short of a majority. Such a showing is insufficient to establish a good-faith reasonable uncertainty as to the Union's continuing majority status." Id. We reach the same result here.

Although these cases involve withdrawals of recognition rather than RM petitions, the Board applied the good-faith uncertainty standard set forth in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), because the cases were pending at the time the Board issued *Levitz*.

[10] In *Allentown Mack,* the Court specifically acknowledged that the express disavowals from 20 percent of the unit, standing alone, would not have been enough to require a conclusion of reasonable doubt. Id. The Court also emphasized that an employer need not show express disavowals by a majority of unit employees, because "that would establish reasonable *certainty*." Id. (emphasis in original). In this case, however, unlike in *Allentown Mack,* there was no evidence other than the petition to support a finding of good faith, reasonable uncertainty.

Dated, Washington, D.C. June 17, 2021

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD